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COURT OF CRIMINAL APPEALS
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No. PD-0438-18

IN THE
TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
8/31/2018
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS, PETITIONER,

v.

RICHARD HYLAND, RESPONDENT.

ON PDR FROM THE THIRTEENTH COURT OF APPEALS

PETITIONER'S BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes, Rules & Other Authorities

NO. PD-0438-18
(Appellate Cause No. 13-16-00596-CR)

THE STATE OF TEXAS, Petitioner,	§ § §	IN THE
V.	§ §	COURT OF CRIMINAL APPEALS
RICHARD HYLAND, Respondent.	§ §	OF TEXAS

PETITIONER'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the District Attorney for the 105th Judicial District of Texas, and respectfully urges this Court to reverse the judgment of the Thirteenth Court of Appeals in the above named cause for the reasons that follow:

STATEMENT OF THE CASE

Richard Hyland was indicted for Intoxication Manslaughter; specifically, for causing the death of his wife, Jaime Doherty, as a result of crashing his motorcycle by reason of his intoxication. (CR p. 5) He was found guilty and sentenced by a jury to 27 years in prison, on August 8, 2016. (CR p. 1529)

A panel of the Thirteenth Court of Appeals reversed the trial court's judgment and conviction in an unpublished opinion on April 5, 2018. The State did not file a motion for rehearing.

ISSUES PRESENTED

GROUND ONE

The Thirteenth Court of Appeals erred in suggesting that the sustaining of a *Franks* motion and the purging of false statements from a search warrant affidavit triggers a heightened legal standard of "clear" probable cause with regard to the remaining allegations in the affidavit.

GROUND TWO

The Thirteenth Court of Appeals erred in concluding that a strong smell of alcohol on the breath of a driver involved in a serious motor vehicle accident does not furnish probable cause for a blood warrant.

STATEMENT OF FACTS

Police Officer Raymond Harrison testified that when he arrived at the accident scene right before 11:00, the medics were loading Hyland into an ambulance. (RR vol. 4, p. 5) Officer Harrison testified that he smelled the strong odor of alcohol on Hyland's breath at the hospital as he read the DIC 24. (RR vol. 4, pp. 7, 11, 63) At 2:04 a.m., some three hours after the accident, he witnessed Hyland's blood being drawn at the hospital pursuant to a search warrant. (RR vol. 4, pp. 63-64, 78, 93)

DPS Forensic Scientist James Evans testified that he tested the blood sample in question, which revealed an alcohol concentration of 0.175, a little over two times the legal limit. (RR vol. 5, pp. 31, 43-44)

The Affidavit for Search Warrant in the present case (DX # 2) listed the time of the accident as 10:50 p.m. on May 30, 2014, which the Court may

judicially notice was a Friday night.[1] It set forth the following relevant information:

> Paragraph 5 - Named witnesses (Juan and Phyllis Ledesma) provided their birth dates and phone numbers and told Officer Harrison that they had observed Hyland operating a motor vehicle in a public place.
>
> Paragraph 6 - Officer Harrison stated that he observed Hyland's general appearance to be bloody and that he had a strong odor of alcohol. Specifically, Officer Harrison stated, "I made the following observations about the suspect … Odor of alcohol strong."
>
> Paragraph 7 - Officer Harrison stated that he administered field sobriety tests on Hyland and that the results were attached, although no such results were attached to the warrant affidavit.
>
> Paragraph 8 - Officer Harrison stated that Hyland was involved in a motorcycle crash. The affidavit, as well as the incorporated and attached report, listed only the motorcycle as being involved in a crash.
>
> Paragraph 9 - Officer Harrison stated that "I have seen intoxicated persons on many occasions in the past. Based on all of the above and my experience and training, I determined that [Hyland] was intoxicated …." Officer Harrison also stated that he requested and the subject refused to provide a breath or blood sample.

At the *Franks* hearing conducted during the middle of trial, although Officer Harrison conceded that he did not administer field sobriety tests or request a breath or blood sample, explaining that these paragraphs were simply a part of the printed language on the form, he testified that he did smell the strong odor of

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1 Courts may judicially notice what day of the week corresponds to a particular date. *Price v. State*, 157 Tex. Crim. 625, 626, 252 S.W.2d 167, 168 (1952); *McAllister v. State*, 55 Tex. Crim. 264, 266, 116 S.W. 582, 584 (1909); *Deaton v. State*, 948 S.W.2d 371, 372 n.1 (Tex. App.—Beaumont 1997, no pet.).

alcohol on Hyland's breath at the hospital as he read the DIC 24. (RR vol. 4, pp. 7, 11, 63)

The trial court indicated that it would excise Paragraph 7 of the warrant affidavit concerning field sobriety tests and the second sentence in Paragraph 9 concerning a breath or blood sample, but the trial court denied the motion to suppress based on the remaining paragraphs of the warrant affidavit. (RR vol. 4, p. 21)

Moreover, the affidavit clearly showed that Hyland was driving at approximately 10:50 p.m. on May 30, 2014 (DX # 2), and that the warrant was signed and issued at 1:19 a.m. on May 31, 2014 (DX # 2-A), less than three hours later.

SUMMARY OF THE ARGUMENT

Ground One – The Thirteenth Court of Appeals erred in applying a higher standard for probable cause to a search warrant affidavit after other portions of the affidavit had been excised pursuant to a *Franks* challenge. The requirement that the remaining valid portions of the affidavit "clearly" establish probable cause refers to the clarity with which those remaining portions may be separated from the offending or false statements, and not to the degree of proof necessary to show probable cause to issue the warrant.

Ground Two – The Thirteenth Court of Appeals erred in holding that a strong smell of alcohol on the breath of a driver involved in a serious motor

vehicle accident does not furnish probable cause for a blood warrant. The fact that a serious crash occurred and the driver in question had recently been drinking alcohol creates a reasonable inference of DWI and/or that alcohol contributed in some manner to a criminal offense which resulted in the crash, which is at least sufficient to show a fair probability that a blood test would provide evidence relevant to that criminal offense.

ARGUMENT

GROUND ONE

The Thirteenth Court of Appeals erred in suggesting that the sustaining of a *Franks* motion and the purging of false statements from a search warrant affidavit triggers a heightened legal standard of "clear" probable cause with regard to the remaining allegations in the affidavit.

Ordinarily, a judge may look only within the four corners of a search warrant affidavit to determine if probable cause exists. *Massey v. State,* 933 S.W.2d 141, 148 (Tex. Crim. App. 1996). The reviewing court is likewise bound by the facts set forth in the affidavit. *Ramsey v. State,* 579 S.W.2d 920, 922 (Tex. Crim. App. 1979); *Carroll v. State,* 911 S.W.2d 210, 218 (Tex. App.-Austin 1995, no pet.). However, an exception to this rule exists where 1) the affidavit contains false statements made knowingly, intentionally, or with reckless disregard for the truth and 2) the false statements are necessary to finding probable cause. *Franks v. Delaware,* 438 U.S. 154, 171-72, 98 S.Ct. 2674 (1978). If at a *Franks* hearing the defendant establishes the allegation of

perjury or reckless disregard by a preponderance of the evidence, the affidavit's false material is set aside, and if the remaining content of the affidavit does not still establish probable cause, the search warrant must be voided and the evidence resulting from that search excluded. *Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007).

In its present opinion, the Thirteenth Court of Appeals references this Court's own guidance that, when a *Franks* motion has been sustained, the normal deference to the magistrate's decision to issue a warrant is not afforded to the remaining allegations in the warrant[2] and that the remaining portions of the affidavit must "clearly" establish probable cause for the search. (Opinion p. 7 (citing *State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015) and *McClintock v. State*, 444 S.W.3d 15, 19 (Tex. Crim. App. 2014)))

When reviewing the historical line of cases mentioned by *Le*, the terms used therein plainly refer to the "clear" distinction between the tainted or false information in the warrant and the remaining basis for probable cause, and not, as

2 When the trial judge at a *Franks* hearing has found a violation and is reviewing the remaining portions of the affidavit for probable cause, it would seem logical that the same deference paid to the magistrate should be transferred to the trial judge. At that point, the trial judge is effectively performing the function of a magistrate in reviewing the sufficiency of the affidavit, absent the false portions thereof. Since the trial judge is functioning in that capacity, there is no reason for the appellate court to depart from its standard practice of giving deference to the magistrate/judge. The trial court is, after all, in the best position to observe the offending affiant at the *Franks* hearing and to judge his overall credibility regarding the remaining allegations that support probable cause.

the Thirteenth Court of Appeals seems to imply, to the legal quantum of evidence necessary to establish probable cause.

Specifically, *Le* cited this Court's earlier decision in *Brown v. State*, 605 S.W.2d 572 (Tex. Crim. App. 1980), where it held that "[a] search warrant based in part on tainted information is nonetheless valid if it *clearly* could have been issued on the basis of the untainted information in the affidavit." *Le*, 463 S.W.3d at 877 (quoting *Brown*, 605 S.W.2d at 577) (emphasis added). *Le* also pointed to the Court's opinion in *McClintock*, where a lack of clarity was found in the ambiguity of the remaining terms of the warrant. *Le*, 463 S.W.3d at 878 (citing *McClintock*, 444 S.W.3d at 19). And in *Castillo v. State*, 818 S.W.2d 803 (Tex. Crim. App. 1991), the Court said that "if the tainted information was *clearly* unnecessary to establish probable cause for the search warrant, then the defendant could not have been harmed by the inclusion of the tainted information in the affidavit." *Id.* at 805. This Court's use of the term "clearly" is obviously directed at the distinction between the tainted and untainted allegations and is simply the corollary to the analysis of how "necessary" the false allegations are to a finding of probable cause. *See Franks*, 438 U.S. at 171-72.

This Court in *Le* said nothing to suggest that its use of the term "clearly" was intended to alter or heighten the legal requirements for probable cause, but implied the opposite by concluding that "reviewing courts are still required to read the purged affidavit in accordance with *Illinois v. Gates*," including

reasonable inferences and the application of a flexible, non-demanding standard. 463 S.W.3d at 877–78.

In the present case, rather than reading "clearly" as merely a reference to the degree to which the tainted or false information is intermixed with, or separable from, the remaining non-tainted factual allegations, the Thirteenth Court of Appeals suggests that it creates a heightened legal requirement or standard for probable cause, even surpassing probable cause in the context of warrantless arrests and searches. Specifically, in discussing almost identical cases where probable cause has been found on the basis of a serious accident and the odor of alcohol, the Thirteenth Court of Appeals said:

> However, these cases dealt with warrantless arrests, and none dealt with a situation in which the trial court has sustained a *Franks* motion and purged false statements from a warrant affidavit, triggering the requirement that the independently acquired and lawful information stated in the affidavit must "clearly" establish probable cause. These warrantless arrest cases offer limited assistance.

(Opinion p. 10 (citations omitted))

> Reading the affidavit with the false statements excised, and following the guidance of *McClintock* and *Lollar*, we must conclude that the affidavit does not "clearly" establish probable cause.

(Opinion p. 12)

As the Thirteenth Court of Appeals' Opinion sets out, absent the false allegations in Officer Harrison's warrant affidavit, the remainder of the pertinent allegations show the following:

> Paragraph 5: Two identified witnesses indicated that Hyland was operating a motor vehicle in a public place.
> Paragraph 6: Officer Harrison observed Hyland's appearance to be bloody and a strong odor of alcohol.
> Paragraph 8: Hyland was involved in a motor vehicle crash in which his passenger died and he was in the hospital in a coma.
> Paragraph 9: Officer Harrison determined that Hyland was intoxicated based on "all of the above," including specifically Officer Harrison's experience and training and having seen intoxicated persons on many occasions in the past.

(Opinion pp. 3-4)

The portions of Officer Harrison's affidavit which the trial court excised at the *Franks* hearing, falsely indicated that Hyland had performed field sobriety tests and that he had refused Officer Harrison's request to give a sample of his breath or blood. (Opinion p. 4)

Arguably, the present affidavit gives a good example of what lessened deference and "clear" probable cause was intended to cover. Specifically, the remaining non-excised portion of Paragraph 9 contains Officer Harrison's determination that Hyland was intoxicated based on his experience and training and "all of the above," which may have included an inference that Hyland failed the field sobriety testing which was referenced above but which never actually took place. Under lessened deference, Officer Harrison's determination that Hyland was intoxicated could not clearly be separated from his false reference to the non-existent field sobriety testing. As such, the trial and reviewing courts might properly have discounted that determination, as well as the excised

portions of the warrant.[3]

In contrast, the remaining allegations that Hyland had been driving a motor vehicle, that he was involved in a serious accident in which someone died, and that he had a strong odor of alcohol, have no connection to the false representations concerning field sobriety tests and refusal to give a sample, and there is no justification for giving these observations any less weight than the legal standard for probable cause allows.

In other words, a *Franks* violation should not lead to a distinction between "probable cause" and "clear probable cause" as two separate quanta of evidence justifying a search.

Franks said nothing about eliminating deferential review or a new heightened requirement for "clear" probable cause when it referred to the sufficiency of the remaining allegations to support a finding of probable cause. 438 U.S. at 171–72. To the extent that this and other lower courts have hinted that such a heightened standard applies to the review of the remaining allegations in a tainted warrant, that standard remains uncertain in its application and in need of clarification, especially in view of the obvious potential for misapplication, as in the present opinion by the Thirteenth Court of Appeals.

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3 Arguably, however, as suggested in Footnote 2, the trial court assumed the function of a magistrate at this point in judging the credibility of Officer Harrison's determination that Hyland was intoxicated based on his training and experience, and the reviewing court of appeals should have deferred to the trial court's implicit determination that Officer Harrison was credible.

GROUND TWO

The Thirteenth Court of Appeals erred in concluding that a strong smell of alcohol on the breath of a driver involved in a serious motor vehicle accident does not furnish probable cause for a blood warrant.

The Thirteenth Court of Appeals concludes that "[t]he purged affidavit states only two particular facts related to intoxication: Hyland was in a coma after a collision that killed his passenger, and Officer Harrison perceived a 'strong' odor of alcohol from Hyland." (Opinion p. 9) [4] In concluding that this was insufficient to establish probable cause to obtain a sample of Hyland's blood, the Thirteenth Court has decided a matter in conflict with the decisions both of this Court and of other intermediate courts of appeals.

I. Probable Cause.

Probable cause for a search warrant exists if, under the totality of the circumstances presented to the magistrate, there is at least a "fair probability" or "substantial chance" that contraband or evidence of a crime will be found at the specified location. *Illinois v. Gates,* 462 U.S. 213, 238, 243 n. 13, 103 S.Ct. 2317 (1983); *Flores v. State,* 319 S.W.3d 697, 702 (Tex. Crim. App. 2010). Probable cause for a search warrant does not require that, more likely than not, the item or items in question will be found at the specified location. *Texas v. Brown,* 460 U.S. 730, 742, 103 S.Ct. 1535 (1983); *Flores,* 319 S.W.3d at 702. In his

4 The State would point out, however, that the affidavit also included identified witnesses who saw Hyland driving. (Opinion p. 3 (Paragraph 5))

determination of whether probable cause exists, the magistrate may interpret the probable cause affidavit in a non-technical, common-sense manner and he may draw reasonable inferences from it. *Illinois v. Gates*, 462 U.S. at 235–38; *Flores*, 319 S.W.3d at 702.

II. Strong Odor + Accident.

Texas courts have consistently held that probable cause to arrest for DWI exists where the defendant is involved in a collision and a law enforcement officer detects the strong odor of alcohol on his breath. *See Pesina v. State*, 676 S.W.2d 122, 127 (Tex. Crim. App. 1984) (recognizing that officer had probable cause to arrest defendant where the defendant was involved in a collision with another vehicle and had a strong odor of alcohol on his breath); *State v. May*, 242 S.W.3d 61 (Tex. App.-San Antonio 2007, no pet.) (reversing trial court's suppression order where evidence of intoxication included officer's observations that defendant had collided with another vehicle and "smelled of alcohol at the time of her accident"); *Washburn v. State*, 235 S.W.3d 346, 350–51 (Tex. App.—Texarkana 2007, no pet.) (holding probable cause existed to arrest for DWI where suspect's car collided with a tree and suspect had signs of intoxication including odor of alcohol); *State v. Cullen*, 227 S.W.3d 278, 282 (Tex. App.-San Antonio 2007, pet. ref'd) (holding probable cause existed to arrest defendant for DWI where officers witnessed defendant crash his vehicle into a telephone pole after attempting to negotiate a turn at a high rate of speed and defendant smelled

of alcohol at the time of his accident); *Knisley v. State*, 81 S.W.3d 478, 483-84 (Tex. App.-Dallas 2002, pet. ref'd) (holding probable cause to arrest defendant for DWI where officer knew defendant was involved in a single vehicle accident, was unable to answer simple questions, and smelled of alcohol); *Broadnax v. State*, 995 S.W.2d 900, 904 (Tex. App.-Austin 1999, no pet.) (holding probable cause to arrest defendant for DWI where officer knew defendant crashed his vehicle trying to pass a truck and officer smelled alcohol on defendant's breath after the accident); *Mitchell v. State*, 821 S.W.2d 420, 424-25 (Tex. App.-Austin 1991, pet. ref'd) (holding probable cause to arrest defendant for DWI where arresting officer learned from fellow officer that defendant had been involved in a serious single vehicle accident and smelled of alcohol); *see also State v. Villarreal*, 476 S.W.3d 45, 50 (Tex. App.–Corpus Christi 2014) (noting that there was no dispute that officer had probable cause to arrest where officer testified that the defendant "appeared to be intoxicated based on his red watery eyes, slurred speech, and swaying back and forth"), *aff'd*, 475 S.W.3d 784 (Tex. Crim. App. 2014).

In addition, other jurisdictions as well have held that indications merely of alcohol consumption, such as the smell or odor of alcohol, when coupled with a traffic accident, provide sufficient facts to establish probable cause to arrest for DWI. *See Engesser v. Dooley*, 457 F.3d 731, 740 (8th Cir. 2006); *State v. Bell*, 429 S.W.3d 524, 532–35 (Tenn. 2014) (and cases cited therein); *State v. Blank*,

90 P.3d 156, 163 & n.41 (Alaska 2004) (and cases cited therein); *State v. Grohoski*, 390 N.W.2d 348, 350–51 (Minn. Ct. App. 1986); *State v. Evetts*, 670 S.W.2d 640, 642 (Tenn. Crim. App. 1984).

Moreover, probable cause to arrest for DWI generally carries with it probable cause to obtain a blood sample at the time of arrest to confirm such intoxication.

In order to obtain a search warrant for a blood sample in these circumstances, the arresting officer must have a substantial basis for concluding that, under the totality of the circumstances, there was fair probability or substantial chance that a blood-alcohol test would reveal evidence that appellant had been intoxicated at the time he drove. *Luckenbach v. State*, 523 S.W.3d 849, 856-58 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.); *Thom v. State*, 437 S.W.3d 556, 562 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Foley v. State*, 327 S.W.3d 907, 912 (Tex. App.—Corpus Christi 2010, pet. ref'd).

When the defendant's smell and appearance, and the surrounding circumstances, already provide probable cause to believe he has been recently driving while intoxicated at the time a blood sample is sought, probable cause for a warrant is present. *See Luckenbach*, 523 S.W.3d at 856-58; *Thom*, 437 S.W.3d at 562; *Foley*, 327 S.W.3d at 912; *see also Engesser*, 457 F.3d at 740 (probable cause to seize blood sample based on the strong odor of alcohol on the breath of a driver involved in a serious accident).

Moreover, in order to be relevant evidence, this Court has held that alcohol test results need not be conclusive as to whether the defendant was legally intoxicated at the time he was driving, but may simply be "pieces in the evidentiary puzzle for the jury to consider in determining [intoxication]." *Stewart v. State*, 129 S.W.3d 93, 96-97 (Tex. Crim. App. 2004). In determining probable cause for DWI, it should be borne in mind that the State need not prove any magic number or BAC to prove intoxication by the alternate means of "not having the normal use of mental or physical faculties by reason of the introduction of alcohol." Tex. Penal Code § 49.01 (2)(A). The crash, coupled with recent consumption of alcohol, creates a strong possibility that the driver in question lost the normal use of his mental or physical faculties, whether or not the BAC level was high enough on its own to qualify as intoxication under section 49.01(2)(B).

In addition, finding probable cause for a blood warrant under these circumstances is consistent with the common sense connection between alcohol and traffic accidents.

This Court has made it clear that the fact of a car crash or accident is itself a relevant fact and circumstance in DWI probable cause analysis. *See Wiede v. State*, 214 S.W.3d 17, 26 (Tex. Crim. App. 2007).

The United States Supreme Court has stressed that "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in

eradicating it." *Missouri v. McNeely*, 569 U.S. 141, 160, 133 S. Ct. 1552 (2013) (quoting *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451, 110 S.Ct. 2481 (1990)). In addition, the Supreme Court has recognized "certain driving behaviors as sound indicia of drunk driving," including weaving, crossing the center line, driving in the median, and other erratic driving behaviors typically associated with accidents. *Navarette v. California*, 134 S. Ct. 1683, 1690–91 (2014).

According to the NHTSA, Traffic Safety Facts, 2014 Data (No. 812231, Dec. 2015), "alcohol-impaired-driving fatalities accounted for 31 percent of all motor vehicle traffic fatalities in the United States in 2014," and Texas ranked among the most dangerous states for drunk driving, as "[t]he percentage of alcohol-impaired-driving fatalities among total traffic fatalities in States ranged from a high of 41 percent (Massachusetts, North Dakota, and Texas) …."

Considering the magnitude and seriousness of the problem, the clear connection between alcohol consumption and traffic accidents provides a common-sense inference that should generally be sufficient to establish probable cause to search the blood of a driver who has alcohol on his breath and was involved in a serious accident. To hold otherwise would significantly impair the ability of law enforcement officers to obtain evidence of intoxication in cases where common sense and experience suggest the likelihood that such evidence will be found.

III. Other Potential Offenses.

In addition, the Court need not focus exclusively on the offense of DWI when determining probable cause for a blood warrant, as the alcohol level of the driver of a vehicle involved in a serious accident may be relevant to other offenses as well.

In a nationwide survey discussed by the National Highway Traffic Safety Administration in *Critical Reasons for Crashes Investigated in the National Motor Vehicle Crash Causation Survey*, Traffic Safety Facts (February 2015)[5], driver error was assigned as the reason for 94 percent of the crashes in the survey, with vehicular faults, environmental reasons, and unknown other reasons each causing only 2 percent of the crashes. Such driver errors may be the result of any number of factors, such as fatigue, distraction, recklessness, excessive speed, etc. The fact that a crash occurred at all suggests the probability that one of the drivers involved committed some traffic offense, the most likely culprits being DWI, speeding, or recklessness. However, when the facts suggest that one of those drivers has recently been drinking alcohol, common sense and national statistics suggest this to be an extremely likely reason, whether it be the sole factor or only a contributing factor to the crash. Nor does it necessarily need to rise to the level of showing intoxication under the DWI statute, as long as the effects of the

5 (accessable at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812115).

alcohol can fairly be viewed as evidence relevant to some driving behavior in violation of the law, such as recklessness, speeding, or failure to maintain a safe following distance.

Specifically, a person commits the offense of reckless driving if he "drives a vehicle in wilful or wanton disregard for the safety of persons or property." Tex. Transp. Code § 545.401(a). A person is guilty of speeding if he "drive[s] at a speed greater than is reasonable and prudent under the circumstances then existing." Tex. Transp. Code § 545.351(a). And a person similarly commits a traffic offense if he fails to "maintain an assured clear distance between the two vehicles so that, considering the speed of the vehicles, traffic, and the conditions of the highway, the operator can safely stop without colliding with the preceding vehicle or veering into another vehicle, object, or person on or near the highway." Tex. Transp. Code § 545.062(a). These and other such traffic offenses are dependent upon the totality of the circumstances then existing at the time the driving behavior occurs, and it is reasonable to conclude that one of those then existing circumstances would be the amount of alcohol the defendant had in his system at the time and its effects on his judgment and responses.

In other words, even if the level of alcohol in the suspect's blood is below the legal limit, and even if he might not otherwise be "intoxicated" under the DWI statute, any level of alcohol in his blood that might have affected his driving skills is a relevant factor in assessing these other potential offenses. This Court has

noted that factors such as intoxication are relevant considerations in determining whether a person was grossly negligent in his failure to control speed or maintain a safe distance. *See Queeman v. State*, 520 S.W.3d 616, 630 (Tex. Crim. App. 2017).

As stated above, "probable cause" does not require the State to prove that intoxication more likely than not was a contributing factor, but only a fair probability that the level of alcohol in the suspect's blood will be relevant as evidence of a crime. *See Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010). All that the blood test has to provide is another piece in the evidentiary puzzle. *Stewart v. State*, 129 S.W.3d 93, 96-97 (Tex. Crim. App. 2004). It is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence. *Id*. at 96.

Thus, it would unnecessarily limit the scope of inquiry if DWI were the only offense on the table when determining probable cause for a blood warrant in connection with a serious crash.

IV. Other Factors.

In the present case, moreover, in addition to the strong odor of alcohol on Hyland's breath and his having been the driver of a vehicle involved in a serious crash, other factors as well contribute to probable cause for a blood warrant.

A. One-Vehicle Crash.

In his determination of whether probable cause exists, the magistrate may interpret the probable cause affidavit in a non-technical, common-sense manner and he may draw reasonable inferences from it. *Flores*, 319 S.W.3d at 702 (citing *Illinois v. Gates*, 462 U.S. 213, 235-38, 103 S.Ct. 2317 (1983)); *see also Lagrone v. State*, 742 S.W.2d 659, 661 (Tex. Crim. App. 1987) (magistrate reviewing a search warrant affidavit is permitted to draw reasonable inferences from the facts supporting the averments)..

In addition, documents that are attached to a search warrant affidavit and incorporated by reference therein are properly considered to be a part of the affidavit for purposes of establishing probable cause. *See Barnes v. State*, 876 S.W.2d 316, 327–28 (Tex. Crim. App. 1994); 1 Tex. Prac. Guide Crim. Prac. & Procedure § 6:102 (documents that are both incorporated into the affidavit by internal references in the affidavit to those documents and that are physically attached to the document specifically styled "affidavit" are a part of the affidavit and may be considered.); *see also Kotlar v. State*, 706 S.W.2d 697, 701 (Tex.App.—Corpus Christi 1986, pet. ref'd) (attached offense report was properly part of the information the magistrate had before him when deciding whether to authorize a warrant).

Both the present warrant affidavit and the attached and incorporated report reference only a "motorcycle crash" involving injuries to the defendant and his

passenger, with no mention of any other vehicle. Had another vehicle been involved in the crash, one would expect, under a common-sense reading of the affidavit and report, to see some mention of that other vehicle and the condition of its occupants. The absence of any such information creates a strong inference that this was a one-vehicle crash.

Logically, a one-vehicle crash is an even stronger indication that the driver/suspect caused the crash as a result of his intoxication, as it significantly diminishes the possibility that another driver caused it.

B. 10:50 p.m. on a Friday Night.

Time of night is one relevant factor to consider in determining whether a suspect was intoxicated. See *Foster v. State*, 326 S.W.3d 609, 613-14 (Tex. Crim. App. 2010) (considering fact that officers encountered defendant suspected of driving while intoxicated at 1:30 a.m.); *Curtis v. State*, 238 S.W.3d 376, 381 (Tex. Crim. App. 2007) (considering facts that officers observed defendant weaving in and out of his lane several times over short distance around 1:00 a.m.). In the present case, the affidavit shows that the accident occurred late enough (10:50 p.m.) on a Friday night to suggest a day and time when intoxicated drivers are commonly found on the road. Though perhaps not of controlling significance, this factor at least has some potential to push this warrant even further into the realm of probable cause to support the blood warrant.

C. Officer Harrison's Observation.

Finally, as discussed above, the trial court was also entitled to credit Officer Harrison's observation, based on his own training and experience, that Hyland appeared to be intoxicated at the time he encountered him after the accident. As with day and time of night, though the officer's perception may not alone be a strong indication of intoxication, it should be considered as one additional factor.

Based on the foregoing, the Thirteenth Court of Appeals erred in failing to find probable cause under these circumstances.

PRAYER FOR RELIEF

For the foregoing reasons, the State requests that this Court reverse the judgment of the Thirteenth Court of Appeals and remand to that Court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 4,799.

/s/ *Douglas K. Norman*

Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that, pursuant to Tex. R. App. P. 6.3 (a), copies of this brief were e-served on August 30, 2018, on Respondent's attorney, Mr. Christopher Dorsey, at Chris@Dorseylegal.com**,** and on the State Prosecuting Attorney, at Stacey.Goldstein@SPA.texas.gov.

/s/ *Douglas K. Norman*

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